Citibank N.A. v Mrs N.D. Chandrasegaran Nee Nirmala Devi a/p P Ratnadurai

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO: S1-24-206 OF 1992
ABDUL MALIK ISHAK J
15 MAY 2007

Civil Procedure — Stay of proceedings — Application for — Pending impeachment proceedings — Discretionary Remedy — Special circumstances — Danger of perpetuating fraud on the court — Nullity of proceedings — Nugatory approach — Whether successful party will be injuriously affected by a stay — Whether bona fide — Novel issue

Civil Procedure — Res judicata — Elements to satisfy criteria for finding of res judicata — Whether impeachment proceedings an attempt to relitigate the matter

Civil Procedure — Judgment and orders — Order made by court — Natural justice — Judge recused himself on the ground of breach of the rules of biasness — Whether decision is null and void

The plaintiff's filed an application to stay inter alia all further proceedings before this court or alternatively the plaintiff's appeal to the judge in chambers pending the disposal of the suit in the Kuala Lumpur High Court Civil Suit No: S4 (S2)-21-14-1997 (the impeachment proceedings) (encl 87). The defendant's oppose the application. The plaintiff's obtained an order for sale against a property charged by the first defendant on 1 December 1992. The order for sale was set aside on 5 October 1993 and on 1 September 1994, the defendant's counterclaim was allowed and the plaintiff was ordered to discharge the property. Damages were awarded to the defendant and assessed at RM250,000 on 4 February 1997. The plaintiff appealed against the award and also filed an application for a stay of execution of the award of damages. These two applications are pending before this court. The plaintiff also instituted the impeachment proceedings before another Court seeking to impeach all judgments and decrees obtained before the High Court in the present proceedings alleging fraud.

Held, allowing encl 87 with costs in the cause:

(1) The order dated 5 October 1993 ('the First Order') and the order dated 1 September 1994 ('the Second Order') are not relevant considerations in considering whether these present proceedings should be stayed. The tests for a stay may be stated in this way: it is whether the impeachment proceedings would be rendered nugatory if these present proceedings were not stayed or if there were special circumstances justifying the stay of the present proceedings.

(2) The test for impeaching orders made by a Judge is quite different from deciding whether or not a matter is res judicata. It is now trite law that where judgments or orders are obtained by fraud or collusion, the court has the jurisdiction to set aside the tainted judgment and the proper remedy in these situations would be to file a fresh action and not a re-hearing of the original action (see para 12).

(3) It is settled law that if the plaintiff can show special circumstances in support of its application for stay of proceedings or execution or for some other interim preservation under section 44(1) of the Courts of Judicature Act 1964, then this court will grant a stay of the proceedings (see para 40).

(4) It is, with respect, wrong to say that the decision of RK Nathan J, in that case is null and void. The fact of the matter is that there is a decision of His Lordship and that decision states that there is a reasonable cause of action to be tried in the impeachment proceedings. Had the impeachment proceedings been struck out, there would not be any need for this application in these present proceedings (see para 39).

(5) The basis of the impeachment proceedings is that the defendants in the impeachment proceedings had committed fraud on the court and the plaintiff in these present proceedings. As rehearsed earlier, RK Nathan J in *Citibank Berhad v ND Chandrasegaran Nee & Ors* has found that sufficient allegations of fraud had been raised in the impeachment proceedings and that the defendant clearly had a case to answer. This is a serious allegation made against the defendants in the impeachment proceedings in relation to their conduct in this case. If these present proceedings were to proceed, there is a real danger of the alleged fraud being perpetuated against this court and the plaintiff. This is a special circumstance that should weigh in favour of this court granting a stay of these present proceedings (see para 49).

(6) The deponent is the fourth defendant (Siva Kumar a/l Subramaniam) in the impeachment proceedings and the issue of the defendant's lawful attorney goes to the root of the impeachment proceedings and that would be the fraud that is being alleged by the plaintiff. Thus, there is a real danger that the plaintiff will not be able to recover its money if it makes payment to the defendant and is later successful in the impeachment proceedings. This, by itself, constitutes a special circumstance in allowing a stay of these present proceedings (see para 49).

(7) The basis of the impeachment proceedings is completely different from that of the stay application. The impeachment proceedings cannot be said to be an attempt at re-visiting the same issues as the present proceedings but rather it is to see whether or not the present proceedings should be stayed (see para 69).

[Bahasa Malaysia summary

Plaintif telah memfailkan satu permohonan untuk penggantungan antara lain kesemua prosiding seterusnya di hadapan mahkamah atau secara alternatifnya rayuan plaintif kepada Hakim dalam kamar sementara menunggu guaman di Mahkamah

Tinggi Kuala Lumpur Guaman Sivil No. S4-(S2)-21-14-1997 (prosiding pencabaran) (Lamp 87). Defendan menentang permohonan itu.

Plaintif telah mendapat perintah penjualan terhadap harta yang dicagarkan oleh defendan pertama pada 1 Disember 1992. Perintah penjualan telah diketepikan pada 5 Oktober 1993 dan pada 1 September 1994, tuntutan balas defendan telah dibenarkan dan plaintif telah diarahkan untuk melepaskan harta tersebut. Gantirugi telah diberikan kepada defendan dan ditaksirkan sebanyak RM250,000.00 pada 4 Februari 1997. Plaintif telah merayu terhadap award dan juga memfailkan permohonan untuk penggantungan perlaksanaan kepada gantirugi yang diawardkan. Kedua-dua permohonan ini masih belum selesai di mahkamah ini. Plaintif juga telah memulakan prosiding pencabaran di hadapan mahkamah yang lain memohon untuk mencabar kesemua penghakiman dan dekri yang diperolehi di Mahkamah Tinggi dan prosiding sekarang atas dakwaan penipuan.

Diputuskan, membenarkan lamp 87 dengan kos dalam kausa.

(1) Perintah bertarikh 5 Oktober 1993 ('Perintah Pertama') dan perintah bertarikh 1 September 1994 ('Perintah Kedua') adalah tidak relevan untuk membuat pertimbangan sama ada prosiding sekarang harus digantung. Ujian untuk penggantungan mungkin dinyatakan sebegini; sama ada prosiding pencabaran menjadi tidak berguna jika prosiding sekarang tidak digantung atau jika ada keadaan khas memberikan alasan yang kuat terhadap penggantungan prosiding sekarang.

(2) Ujian untuk mencabar perintah-perintah yang dibuat oleh Hakim adalah berbeza dari memutuskan sama ada perkara tersebut adalah res judicata atau tidak. Ia sekarang ini adalah undang-undang yang mantap lama bahawa bila penghakiman-penghakiman atau perintah-perintah diperolehi melalui penipuan atau pakatan sulit, mahkamah mempunyai bidang kuasa untuk mengenepikan perintah yang cacat dan remedi yang betul dalam situasi-situasi ini adalah dengan memfailkan tindakan baru dan bukannya melalui pendengaran semula tindakan asal (lihat perenggan 12).

(3) Ianya adalah undang-undang yang telah diperuntukkan/ditetapkan jika plaintif dapat menunjukkan keadaan-keadaan khas untuk menyokong jika permohonannya untuk penggantungan prosiding-prosding atau perlaksanaan atau untuk lain-lain pemeliharaan sementara di bawah s 44 (1) Akta Mahkamah Kehakiman 1964, barulah mahkamah ini akan memberikan penggantungan kepada prosdiding-prosiding (lihat perenggan 40).

(4) Dengan rasa hormatnya, adalah salah untuk mengatakan bahawa keputusan YA RK Nathan, dalam kes itu adalah sebagai batal dan tidak sah. Fakta dalam perkara itu adalah ia adalah keputusan Yang Arif Hakim dan keputusan menyatakan bahawa terdapat kausa tindakan yang munasabah untuk dibicarakan dalam prosiding pencabaran. Jika prosiding pencabaran dibatalkan, tidak ada sebarang keperluan bagi permohonan ini dalam prosiding-prosiding ini (lihat perenggan 39).

(5) Asas kepada pencabaran prosiding adalah defendan-defendan dalam prosiding pencabaran telah melakukan penipuan kepada mahkamah dan plaintif dalam

prosiding-prosiding sekarang. Sebagaimana yang diulang-ulang sebelum ini, Yang Arif RK Nathan, dalam *Citibank Berhad v ND Chandrasegaran Nee & Ors* mendapati bahawa dakwaan-dakwaan yang cukup untuk penipuan telahpun dibangkitkan dalam prosiding pencabaran dan defendan secara jelasnya mempunyai kes untuk dijawab. Ini adalah satu dakwaan serius yang dibuat terhadap defendan-defendan dalam prosiding pencabaran berkaitan dengan kelakuan mereka dalam kes ini. Jika prosiding-prosiding sekarang ini hendak diteruskan, terdapat bahaya sebenar untuk dakwaan penipuan dikekalkan terhadap mahkamah ini dan plaintif. Ini merupakan keadaan khas yang perlu dipertimbangkan yang mendorong kepada mahkamah ini untuk memberikan penggantungan prosiding-prosiding sekarang ini (lihat Perenggan 49).

(6) Saksi bersumpah adalah defendan keempat (Siva Kumar a/l Subramaniam) dalam prosiding pencabaran dan persoalan mengenai peguam defendan yang sah kembali kepada punca prosiding pencabaran dan itu adalah penipuan sebagaimana dakwaan plaintif. Dengan itu, terdapat bahaya sebenar bahawa plaintif tidak akan mendapat kembali wangnya jika ia membuat bayaran kepada defendan dan kemudiannya berjaya dalam prosiding pencabaran. Ini, dengan sendirinya, akan membentuk keadaan khas dalam membenarkan penggantungan dalam prosiding-prosiding sekarang ini (lihat Perenggan 49).

(7) Asas kepada prosiding pencabaran adalah berbeza sama sekali dengan penggantungan perlaksanaan. Prosiding pencabaran tidak boleh dikatakan sebagai percubaan untuk merujuk kembali isu-isu pertikaian sama seperti prosiding sekarang tetapi lebih melihat kepada sama ada prosiding sekarang perlu digantung atau tidak (lihat Perenggan 69).]

Notes

For cases on application for stay of proceedings, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2401–2424.

For cases on order for sale, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 376–379.

For the case on elements to satisfy criteria for finding of res judicata, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) para 6043.

Cases referred to

Cheah Wong Nyan and Cheah Sin Kee v (1) K.A.L.R.M. Palaniappa (2) Cheah Lean Guan (3) Official Assignee Of The Property Of Cheah Lean Guan a bankrupt [1935] 1 MLJ 31 (refd)

Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143 (refd)

Citibank Bhd v ND Chandrasegaran Nee & Ors [1999] 5 MLJ 440 (refd)

R v Bow Street Metropolitan Stipendiary Magistrate and others, exparte Pinochet Ugarte (No 2) [1999] 1 AII ER 577 (refd)

Rowstead Systems Sdn. Bhd. v Bumicrystal Technology (M) Sdn Bhd [2005] 3 MLJ 132 (refd)

Pride-Mould (M) Sdn Bhd v Jemco Sdn Bhd [2001] 3 MLJ 65 (refd)

Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd [1988] 3 MLJ 90 (refd)

Peninsular Land Developmet Sdn Bhd v K Ahmad (No 2) [1970] 1 MLJ 253 (refd)

Serangoon Garden Estate Ltd v Ang Keng [1953] 19 MLJ 116 (refd)

A *Government of Malaysia v Dato Chong Kok Lim* [1973] 2 MLJ 74 (refd)
Board Of Governors Of Sekolah Menengah St Gabriel v Ranjit Singh [1970] MLJ 38 (refd)
Kerajaan Malaysia v Jasanusa Sdn Bhd [1995] 2 MLJ 105 (refd)
Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1
B MLJ 257 (refd)
Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd [2002] 3 MLJ 49 (refd)
All Persons in Occupation of the House and the Wooden Stores Erected on a Portion of Land Held Under Grant No 26977 for Lot 4271 in the Township of Johor Bahru, Johor v Punca Klasik Sdn Bhd [1996] 4 MLJ 533 (refd)
Institut Teknologi Federal Sdn Bhd v IIUM Education Sdn Bhd [2005] 3 MLJ 221
C (refd)
Rowstead Systems Sdn Bhd v Bumicrystal Technology (M) Sdn Bhd [2005] 3 MLJ 132 (refd)
Ling Beng Sung v Kong Thai Sawmill (Miri) Sdn Bhd & Ors. (No.2) [1976] 1 MLJ 131 (refd)
D *New Zealand Society Of Physiotherapists v Accident Compensation Corporation* [1988] 1 NZLR 157 (refd)
In The Matter Of The Trusts Of The Will of Tan Lye Deceased, Yap Liang Neo v Tan Yew Ghee & Anor. [1936] MLJ Rep 113 (refd)
Henderson v Henderson (1843) 3 Hare 100 (refd)
E *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* [1975] AC 581 (refd)
Flower v Lloyd (1878) LR 10 Ch D 327 (refd)

Legislation referred to
Powers Of Attorney Act 1949 s 3(2)
Evidence Act 1950 s 85

F
Syahrul Bahiah Jamaludin (Skrine) for the plaintiff.
M Puravalen (S Kanawagi and Dinesh Kanavaji with him) (Khana & Co) for the defendant.

G **Abdul Malik Ishak J:**

ENCLOSURE 87

[1] It is the plaintiff's application to stay, inter alia, all further proceedings before
H this court or alternatively the plaintiff's appeal in encl 39B to the judge in chambers pending the disposal of the suit in the Kuala Lumpur High Court Civil Suit No: S4 (S2)-21-14-1997 (the impeachment proceedings). Enclosure 87 is supported by an affidavit affirmed by Ng Sow Hua on 27 April 1999 as seen in encl 88. The defendant opposes the plaintiff's application and the defendant affirms an affidavit in opposition through one Siva Kumar a/l Sundram on 20 Mei 1999 as seen in encl 90.

I
BRIEF FACTS

[2] The relevant facts may be stated as follows. These present foreclosure proceedings are a result of a loan in the sum of RM252,000 given by the plaintiff to

the defendant and the security for the loan being the charge of the defendant's house in Bangsar, Kuala Lumpur (hereinafter referred to as the 'defendant's property'). In the final analysis, it was ordered in these present proceedings that the order for sale that had been obtained by the plaintiff to foreclose the defendant's property be set aside and that damages be paid by the plaintiff to the defendant as assessed by the learned senior assistant registrar ('SAR'). Damages was duly assessed by the SAR on 4 Februari 1997 and the sum of RM250,000 was awarded to the defendant as seen in encl 46. The plaintiff has appealed to the judge in chambers against the decision of the SAR. And it is this appeal that was referred to earlier as encl 39B.

[3] At the present moment, there are two outstanding applications in these proceedings, including the present application in enclosure 87, and they are as follows:

(a) Enclosure 37 – this is the plaintiff's application for a stay of execution of the order for damages until the disposal of the plaintiff's appeal against that order to the judge in chambers; and

(b) Enclosure 39B – it is the plaintiff's notice of appeal to the judge in chambers against the order by the SAR awarding damages of RM250,000 to the defendant.

THE IMPEACHMENT PROCEEDINGS

[4] On 18 February 1997, the plaintiff instituted an action in the Kuala Lumpur High Court civil suit no: S4(S2)-21-14-97 (impeachment proceedings) seeking for, inter alia, the impeachment of all orders, judgments or decrees of the High Court in the present proceedings obtained after July 1993 on the grounds of fraud by the defendant and several other individuals named in the proceedings.

[5] It is pertinent to mention that the writ of summons and the Statement of Claim of the impeachment proceedings are exhibited in exhibit 'NSH-1' of encl 88. And the parties to the impeachment proceedings are as follows:

(a) the plaintiff in these present proceedings is also the plaintiff in the impeachment proceedings;

(b) the defendant in these present proceedings is the first defendant in the impeachment proceedings;

(c) that Mr Kanawagi a/l Seperumaniam of Messrs Khana & Co, the solicitors acting for the defendant in these present proceedings, has been named as the second defendant in the impeachment proceedings;

(d) the third defendant in the impeachment proceedings is JR Gopinath @ JR Jaya Jaegauby;

(e) the fourth defendant in the impeachment proceedings is Siva Kumar a/l Subramaniam;

(f) the fifth defendant in the impeachment proceedings is Ratnasamy a/l Subramaniam; and

(g) the sixth defendant in the impeachment proceedings is the Pendaftar Hakmilik Wilayah Persekutuan.

[6] The particulars of fraud that has been alleged in the impeachment proceedings are particularised in the Statement of Claim filed in the impeachment proceedings.

THE BASIS OF THE IMPEACHMENT PROCEEDINGS

[7] Essentially, after reading the statement of claim, it can be said that the basis of the impeachment proceedings lies in the fact that all the actions taken by the defendant in these proceedings after July 1993 were not taken by the defendant personally but rather by her purported Powers of Attorney. These present proceedings were brought by the plaintiff against the default of an overdraft facility given by the plaintiff to the defendant. As consideration, for the overdraft facility, the defendant had charged her Bangsar property to the plaintiff. After the default by the defendant, the plaintiff started these present proceedings and obtained an order for sale dated 1 December 1992 of the defendant's property. The public auction of the defendant's property was fixed on 18 August 1993. Two days before the public auction, the sum of RM256,408.49 was paid to the plaintiff as part payment of the amount due under the overdraft by one JR Gopinath @ JR Jaya Jaegauby who purported to be the attorney of the defendant. This payment was accepted by the plaintiff on a without prejudice basis and the public auction was adjourned on condition that the entire amount due by the defendant to the plaintiff was settled. It is a matter of record that there was a dispute between JR Gopinath @ JR Jaya Jaegauby and the plaintiff in respect of the amount still due and owing to the plaintiff.

[8] The said JR Gopinath @ JR Jaya Jaegauby apparently derived his powers from the defendant to deal with the defendant's property from a Power of Attorney dated 30 July 1993 ('the First PA'). It has since been discovered that the said JR Gopinath @ JR Jaya Jaegauby was a bankrupt and was therefore not entitled to be an attorney. As mentioned earlier, the said JR Gopinath @ JR Jaya Jaegauby has been named as the third defendant in the impeachment proceedings.

[9] After the discovery of the fact that JR Gopinath @ JR Jaya Jaegauby was a bankrupt, the defendant quickly appointed one Siva Kumar a/l Sundram as her new attorney by way of a Power of Attorney dated 5 May 1994 ('the Second PA'). This individual has been named as the fourth defendant in the impeachment proceedings. It must be borne in mind that this new appointment was not made before JR Gopinath @ JR Jaya Jaegauby, purportedly acting as the defendant's attorney, had filed an application in the name of the defendant to set aside the order for sale dated 1 December 1992 and claiming for damages from the plaintiff and filing a counterclaim alleging that the charge over the defendant's property be discharged.

[10] On 5 October 1993, his Lordship Anuar J, (who later rose to be the Chief Judge of Malaya) ordered that the order for sale dated 1 December 1992 be set aside. Again, on 1 September 1994, his Lordship Anuar J, also allowed the defendant's counterclaim and ordered that the plaintiff discharge the charge over the defendant's

property. The defendant is also making a grave issue out of the fact that the plaintiff apparently did not appeal against those two orders. The order dated 5 October 1993 ('the First Order') and the order dated 1 September 1994 ('the Second Order') are not relevant considerations in considering whether these present proceedings should be stayed. The tests for a stay may be stated in this way; it is whether the impeachment proceedings would be rendered nugatory if these present proceedings were not stayed or if there were special circumstances justifying the stay of the present proceedings.

[11] The impeachment proceedings are proceedings to set aside the orders made after July 1993 on the grounds of fraud, that is, but for the fact that there was fraud committed in respect of the two PAs, the court would not have made any of the orders that it did. Even if the plaintiff had appealed against both of the orders, those appeals would automatically fail if the impeachment proceedings were successful as the whole substratum of the appeals would have been impeached. And if the plaintiff was not successful in the impeachment proceedings then the status quo remains.

[12] The defendant held onto the notion that the plaintiff is taking the so-called second bite at the proverbial cherry by filing the impeachment proceedings and not appealing. With respect, this argument by the defendant is in fact misplaced. The test for impeaching orders made by a Judge is quite different from deciding whether or not a matter is res judicata. It is now trite law that where judgments or orders are obtained by fraud or collusion, the court has the jurisdiction to set aside the tainted judgment and the proper remedy in these situations would be to file a fresh action and not a re-hearing of the original action (*Cheah Wong Nyan and Cheah Sin Kee v (1) K.A.L.R.M. Palaniappa (2) Cheah Lean Guan (3) Official Assignee Of The Property Of Cheah Lean Guan a bankrupt* [1935] 1 MLJ 31; and *Hock Hua Bank Bhd. v Sahari bin Murid* [1981] 1 MLJ 143). Chang Min Tat F.J writing for the Federal Court in *Hock Hua Bank Bhd. v Sahari bin Murid* aptly said at p 144 of the report:

> But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment: *Hip Foong Hong v Neotia & Co* [1918] A.C. 888 and *Jonesco v Beard* [1930] A.C. 298. The hearing of the action will in a proper case be expedited: Smith v Peizer 65 S.J. 607.

[13] The impeachment proceedings have been found to contain sufficient allegations of fraud, that if proved, would clearly impeach the judgments obtained in these present proceedings. This was so held by his Lordship RK Nathan J, in *Citibank Bhd v ND Chandrasegaran Nee & Ors* [1999] 5 MLJ 440 when dismissing the defendant's application to strike out the plaintiff's claim. However, it must be emphasised that the impeachment proceedings have yet to be disposed of.

[14] The learned counsel for the defendant took exceptions to the judgment of RK Nathan J in *Citibank Bhd v ND Chandrasegaran Nee & Ors*. The learned counsel for the defendant submitted that a complaint was made to the then Chief Justice stating that RK Nathan J, should not have heard the case because he was closely related to one of the parties to the case. The learned counsel for the defendant submitted that RK Nathan J had disqualified himself or in other words admitted that he was a biased

party. According to the learned counsel for the defendant, a decision by a judge who was biased or in other words who had breached the rules of natural justice is a nullity order. In *R v Bow Street Metropolitan Stipendiary Magistrate and others, exparte Pinochet Ugarte (No 2)* [1999] 1 ALL ER 577, a landmark decision of the House of Lords, is a classic example of the law of biasness. There a second Committee of the House of Lords set aside the extradition order made by the first Committee of the House of Lords where one of the law Lords was a dormant but nevertheless a member of a charity closely sharing its objects with Amnesty International and Amnesty International was a party to the appeal supporting the extradition of Pinochet, a retired general and dictator of Chile, from Britian to Chile. The second Committee also ordered that the appeal be heard by another Committee of the House of Lords.

[15] At the local scene, there is a decision of the Court of Appeal in the case of *Rowstead Systems Sdn Bhd v Bumicrystal Technology (M) Sdn Bhd* [2005] 3 MLJ 132 where the court stated that a judge cannot decide on an allegation thrown at him whether he is bias or not for that will contravene the rules of natural justice.

[16] In *Citibank Bhd v ND Chandrasegaran Nee & Ors*, the fourth defendant applied to strike out the case against him and RK Nathan J decided against the fourth defendant. It seems that the fourth defendant did not appeal on the matter and has dropped out from the case. Nevertheless, the learned counsel for the defendant is still of the view that the decision of RK Nathan J is null and void because his Lordship had, on his own accord, discharged himself on the ground of breach of the rules of biasness. The learned counsel for the defendant laments that it is unfortunate that the fourth defendant did not appeal nor apply to expunge the judgment of RK Nathan J. It is also the submission of the learned counsel for the defendant that the decision of RK Nathan J is unworthy of any merit. It has been urged upon me to disregard the decision of RK Nathan J in *Citibank Bhd v ND Chandrasegaran Nee & Ors* in view of the fact that it is an interlocutory decision and not a final decision and therefore it does not act as res judicata nor can it give rise to an estoppel issue (see *Pride-Mould (M) Sdn Bhd v Jemco Sdn Bhd* [2001] 3 MLJ 65, which applied *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd* [1988] 3 MLJ 90 and *Peninsular Land Developmet Sdn Bhd v K Ahmad (No 2)* [1970] 1 MLJ 253).

[17] Notwithstanding the fact that RK Nathan J had recused himself from hearing *Citibank Bhd v ND Chandrasegaran Nee & Ors*, yet his Lordship had made a decision in the case and that decision had been reported. In that case his Lordship held that there was a reasonable cause of action to be tried and that the matter should not be struck out. It is, with respect, wrong to say that the decision of RK Nathan J in that case is null and void. The fact of the matter is that there is a decision of his Lordship and that decision states that there is a reasonable cause of action to be tried in the impeachment proceedings. Had the impeachment proceedings been struck out, there would not be any need for this application in these present proceedings.

[18] It must be borne in mind that the plaintiff did, in fact, start fresh proceedings vide Kuala Lumpur High Court originating summons no: S5-24-415-94 ('the S5 matter'). But the S5 matter had to be withdrawn on 28 April 1995 because his Lordship Anuar J had ordered that the charge on the defendant's property be

discharged on 1 September 1994. After the charge was discharged on 1 September 1994, the plaintiff filed an application for leave to appeal to the Court of Appeal out of time vide Civil Appeal No: W-08-65-94 but the application was not allowed. And in respect of the Second Order dated 1 September 1994 which discharged the charge over the defendant's property, the defendant's allegation that the plaintiff did not appeal was incorrect. In reality, the plaintiff did file an application for leave to appeal to the Court of Appeal against the order dated 1 September 1994 and that application was refused.

[19] Be that as it may, whether or not the plaintiff appealed against the 'First Order' and the 'Second Order' are irrelevant considerations in deciding whether or not to grant a stay of these proceedings pending the disposal of the impeachment proceedings.

[20] It was later discovered, and it was said, that the First PA and the Second PA are not valid, unlawful and void ab initio and cannot be used in any court proceedings and/or dealings with the defendant's property. This forms part and parcel of the particulars of fraud pleaded by the plaintiff in the impeachment proceedings. The First PA was apparently affirmed before the notary public in India by the name of Gorakhsnath N. Kale. The latter stated that the serial number of the First PA did not correspond with his notary register and he cancelled this purported notarial certificate for the First PA.

[21] Now, the second PA was said to be a fraudulent PA. The second PA was purportedly affirmed before the notary public by the name of Sivaram S. Nadkarni. However, there is no registered notary public in the State of Maharashtra of that name.

[22] I must emphasise that encl 87 is not an application for a stay pending an appeal but rather it is an application for a stay pending the disposal of the impeachment proceedings. Enclosure 87 is focussed on the plaintiff's application for a stay of the proceedings and not the hearing of the merits of the impeachment proceedings. A lot of materials were raised by the defendant and these materials may be relevant during the hearing of the impeachment proceedings but they are of no relevance in adjudicating encl 87. The merits of the impeachment proceedings have been raised by the learned counsel for the defendant and out of deference to him, I have alluded to it in this judgment. The merits of the case is not a relevant matter for consideration in deciding whether or not to grant a stay of the present proceedings.

[23] It has not been the plaintiff's contention that there is res judicata or an issue estoppel of the impeachment proceedings. It is the plaintiff's submission that should the court be minded to follow the reasoning of Brown J in Serangoon Garden Estate Ltd v Ang Keng [1953] 19 MLJ 116 and decide to consider the merits of the impeachment proceedings in deciding whether or not there are special circumstances, then the fact that an attempt to strike out the impeachment proceedings was unsuccessful would be of assistance to the court.

ARGUMENTS ADVANCED BY THE DEFENDANT

[24] It is the submission of the defendant that on the face of the record it is very obvious that the plaintiff who did not appeal against the First Order and the Second Order are now attempting to take a second bite at the proverbial cherry by attempting to re-litigate the matter on the grounds that the two orders were obtained by fraud. It is an attempt to exhume the grave of the old case that was concluded on 5 October 1993 in relation to the First Order and on 1 September 1994 in relation to the Second Order, by claiming that these two orders were obtained by fraud.

[25] It is the stand of the defendant that the plaintiff is a world famous bank and, at all times, was represented by the leading law firms in this country and it was not possible that the plaintiff would not have raised the issue of fraud or other allegation which would open the door for them to commence the impeachment proceedings. According to the defendant, this case illustrates the classic statement that justice is like a sword that cuts two ways and in this case it has cut the plaintiff who put in motion the present proceedings and its ego being hurt, the plaintiff is now making use of its vast unlimited financial resources in engaging top lawyers in the country to restore its injured ego.

[26] It is a tussel between the plaintiff, an internationally famous bank and the defendant who was one of the plaintiff's customer's wife who had given her property as a third party charge for a loan given by the plaintiff to the defendant's husband. The defendant defaulted and the plaintiff commenced a foreclosure proceeding in 1991 pursuant to ss 256 and 257 of the National Land Code 1965 and O 81 of the Rules of the High Court 1980 ('RHC'). The plaintiff served the foreclosure proceeding by way of a substituted service and obtained a default order for sale on 1 December 1992. On 18 August 1993, the plaintiff obtained an order for auction. At around this time, the defendant had left the country and was in India. The defendant then appointed the law firm of Messrs Khana & Co to handle her case. And in order for someone to handle her matter, the defendant appointed an attorney by way of a power of attorney. The First PA was dated 30 July 1993 and it was deposited in the Kuala Lumpur High Court on 7 August 1993 vide no 26013/93. During the course of the litigation, according to the defendant, it came to light that the appointed attorney was an undischarged bankrupt and this caused the defendant to appoint another attorney. The Second PA was then made and it was dated 5 May 1994 and it was also deposited in the Kuala Lumpur High Court on 24 May 1994 vide no 18916/94. In the meantime, the plaintiff applied and obtained a date for auction with a reserve price and the auction was set for 18 August 1993. And all the affidavits filed by the defendant was undertaken by her lawful attorney so says the defendant. At around this time, the defendant's loan to the plaintiff was fully paid and this was done in two payments. The first payment for RM256,408.49 comprising of the principal sum was made by the banker's draft. While the second payment was made by way of a bank draft for a sum of RM48,092.40 being interest from the default date to the date of the payment of the principal sum. According to the defendant, the plaintiff disputed the interest sum and claimed for a higher interest. This resulted in a dispute between the parties and it prompted the defendant to apply to the court to set aside the public auction on the ground that she had fully

discharged her loan to the plaintiff. It is said that all the actions were taken on behalf of the defendant by the defendant's local solicitors and her local attorney.

[27] His Lordship Anuar J heard the defendant's application on 5 October 1993. And at this hearing, the plaintiff brought up the issue that the power of attorney given by the defendant to her attorney was fraudulent. His Lordship Anuar J then made a ruling and relied on s 3(2) of the Powers Of Attorney Act 1949 read together with s 85 of the Evidence Act 1950and drew a statutory presumption in favour of a power of attorney and held that the power of attorney was valid. Section 3(2) of the Powers Of Attorney Act 1949 enacts as follows:

> 3. Authentication of powers of attorney
>
> (2) Notwithstanding anything to the contrary contained in any written law in force at the commencement of this Act, an instrument purporting to create a power of attorney duly executed and authenticated in accordance with this section shall be deemed to be properly and validly executed and attested for all or any of the purposes for which a power of attorney may be used under any such written law.

[28] While s 85 of the Evidence Act 1950reads as follows:

> 85. Presumption as to powers of attorney
>
> The court shall presume that every document purporting to be a power of attorney, and to have been executed before and authenticated by a Notary Public or Commissioner for Oaths, or any court, Judge, Magistrate, or consular officer of Malaysia was so executed and authenticated.

[29] It is the submission of the defendant that on the facts, his Lordship Anuar J ruled that the plaintiff's loan has been fully satisfied and his Lordship then granted an order in terms by setting aside the auction. His Lordship further ordered that damages to be assessed against the plaintiff. All these constituted the orders made by his Lordship on 5 October 1993 and this constitutes the First Order. At this time, the plaintiff's solicitors was Messrs Azim Ong and Krishnan. It is said that the plaintiff had changed its solicitors twice. First to Messrs Shearn Delamore & Co, and currently to Messrs Skrine. It is said that the present solicitors cannot affirm or submit on these facts as they were not the parties to the proceedings. The defendant's solicitors then were Messrs Khana & Co.

[30] There was no appeal against the First Order. More than thirty days passed and although Anuar J had ruled that the plaintiff's loan has been repaid, the plaintiff still refused to discharge the charge and refused to return the issue document of title to the defendant. This compelled, so the submission goes, the defendant to make an application to the court to compel the plaintiff to discharge its charge and return the issue document of title to the plaintiff. This application was heard on 1 September 1994. And, again on this date, it is said that the plaintiff's counsel took objection to the effect that the power of attorney was fraudulent. On this date too, the defendant's counsel submitted that the parties were bound by the earlier ruling that the plaintiff's loan has been fully settled and therefore res judicata applies in that a decision made at one stage of the proceeding binds the parties in a subsequent application of the

same proceeding (*Government of Malaysia v Dato Chong Kok Lim* [1973] 2 MLJ 74) and the defendant's counsel also asked for costs. It is submitted that his Lordship Anuar J accepted the plea of res judicata and granted an order in terms and further ordered that damages to be assessed against the plaintiff. This constitutes the Second Order and it is said that there was no appeal against it. It is also said that the Second Order contained a penal clause to the effect that if the plaintiff does not comply with this order, the plaintiff shall be liable to and be exposed to contempt proceedings. Thereafter, it is said that the plaintiff voluntarily discharged the charge and returned the title to the defendant's solicitors. The discharge was registered on 27 September 1994 and, consequently, it is said that the plaintiff's interest in the defendant's property was extinguished.

[31] It is said that the costs of discharging a charge is normally borne by the borrower pursuant to the contract in the loan agreement. It is also said that since his Lordship Anuar J had ordered the plaintiff to discharge the charge and return the issue document of title to the defendant, the costs of the discharging of the charge was borne by the plaintiff. After the plaintiff's charge was discharged on 27 September 1994, the defendant's property was transferred to Ratnasamy a/l Subramaniam, the fifth defendant in the impeachment proceedings. And it is also said that the transfer of the defendant's property to Ratnasamy a/l Subramaniam was done pursuant to the Penang High Court Originating Summons No: MT4-24-88-95 and the order was dated 16 February 1995.

[32] It is said that the defendant's solicitors Messrs Khana & Co shifted their office and became the tenant to Ratnasamy a/l Subramaniam.

[33] The defendant's solicitors Messrs Khana & Co executed two orders for assessment of damages and the SAR concluded a viva voce trial where the plaintiff called three witnesses and the defendant also called three witnesses. That viva voce trial was conducted in 1997. On 4 February 1997, the SAR gave judgment to the defendant for a sum of RM250,000 with interest at 8% per annum from 27 July 1994 to the date of full realisation. Being aggrieved, the plaintiff filed an appeal on 4 February 1997 to the judge in chambers and this appeal can be found in encl 39B and it is still pending before this court.

[34] Two weeks after judgment on the assessment of damages, the plaintiff through its solicitors Messrs Azim Ong & Krishnan filed the impeachment proceedings. This was on 18 February 1997. That impeachment proceedings alleged fraud.

[35] On 17 February 1997, the plaintiff lodged a police report against the defendant's solicitor by the name of Mr. Kanawagi a/l Seperumaniam alleging that the latter had cheated the plaintiff and had transferred the defendant's property to Ratnasamy a/l Subramaniam whom the plaintiff's claim is the brother of Mr Kanawagi a/l Seperumaniam.

[36] It is submitted that following all these events, the plaintiff, a financial giant, has been engaging leading legal firms in Kuala Lumpur and invoking every known law, rule or regulation in order to reverse the SAR's decision on damages. On 28 April

1999, the plaintiff then filed the application in encl 87 to stay all the proceedings before this court until the outcome of the impeachment proceedings.

REBUTTALS BY THE PLAINTIFF

[37] It is emphasised that encl 87 concerns the plaintiff's application for a stay of the proceedings and not the hearing of the merits of the impeachment proceedings. And that the matters raised by the defendant are relevant at the hearing of the impeachment proceedings and not at the hearing of encl 87. In short what the plaintiff is saying is this. That the merits of the case is not a relevant consideration in deciding the issue of the stay. The background facts in this case is a matter of record. It is, with respect, not for the defendant's counsel to make assumptions on how or what the plaintiff felt or thought. It is also not for the defendant's counsel to make submissions based on the facts that are not before this court and by giving evidence from the Bar. This is an application for a stay of the present proceedings pending the disposal of the impeachment proceedings. The impeachment proceedings are based on the fact that the defendants in the impeachment proceedings had committed fraud on the court and the plaintiff in these present proceedings. Whether or not this is true is a matter that is to be decided by the court in the impeachment proceedings. Again, I hasten to add that the arguments advanced by the defendant may be relevant in the impeachment proceedings but they are of no relevance in adjudicating encl 87. What is of relevance here is whether there are special circumstances to support the plaintiff's application for a stay of these present proceedings pending the disposal of the impeachment proceedings.

A DISCRETIONARY REMEDY

[38] Raja Azlan Shah J (as His Majesty then was) in Board Of Governors of Sekolah Menengah *St. Gabriel v Ranjit Singh* [1970] MLJ 38, at p 40 aptly said:

> To bring the point home it must be re-stated that a stay of proceedings is a discretionary remedy to be exercised in accordance with well established judicial principles and that includes the principle that it should not cause injustice to the plaintiff.

[39] And this simple principle has been consistently followed by the courts.

SPECIAL CIRCUMSTANCES

[40] The plaintiff is seeking an order staying all proceedings before this court until the disposal of the impeachment proceedings. It is settled law that if the plaintiff can show special circumstances in support of its application for stay of proceedings or execution or for some other interim preservation under s 44(1) of the Courts of Judicature Act 1964, then this court will grant a stay of the proceedings.

[41] The starting point in considering an application for a stay is the case of *Serangoon Garden Estate Ltd v Ang Keng* where the court stated that special circumstances were needed to justify a court in exercising its discretion to grant a stay.

In that case, Brown J found that there were no special circumstances which could justify the order for a stay. This was what his Lordship said (see p 116):

> Such a ground might well be an important factor to take into consideration if there were other grounds. If, for example, another ground had been that there were merits in the appeal, that fact coupled with the fact that the defendant, if successful, could not be restored to his original position might well have afforded special circumstances to justify the learned District Judge in exercising his discretion to grant a stay; and I should not have thought it right to interfere

[42] And what actually constitutes special circumstances was explained by Edgar Joseph Jr SCJ in delivering the judgment of the Supreme Court in *Kerajaan Malaysia v Jasanusa Sdn Bhd* [1995] 2 MLJ 105, in this way:

> I respectfully agree with those views of the learned VC George J. An attempt was made to define special circumstances by Raja Azlan Shah J (as His Majesty then was) in the case of *Leong Poh Shee v Ng Kat Chong* [1966] 1 MLJ 86, viz:
>
> Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common.
>
> The definition only serves to emphasize the fact that there are myriad circumstances that could constitute special circumstances with each case depending on its own facts. I am of the opinion that the list of factors constituting special circumstances is infinite and could grow with time. Any attempt to limit the list or close a category would be to impose a fetter on the exercise of the discretion of the court whether to grant or stay an execution; making the discretion less of a discretion. This is surely not what discretion is all about. As long as one does not stray beyond the perimeter set by the judicial principles, the discretion can be exercised.

[43] The Federal Court in *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257, speaking through Augustine Paul JCA (now FCJ), laid down the law in these apt words (see p 268 of the report):

> It is therefore clear beyond doubt that there are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if stay was refused is the most common one. It is an example of special circumstances. In other words, special circumstances is the genus of which nugatoriness is a species. If it has been shown that an appeal would be rendered nugatory if stay was refused what it means is that a special circumstance has been established. Thus, they cannot be treated as separate heads and one cannot be an alternative to the other. Neither can one be accepted or rejected in favour of the other as they are inter-related.

[44] And at p 269 of the report, his Lordship had this to say:

> It is therefore unnecessary for me to consider the merits of the respective case of the applicants and respondents.

[45] Thus, the merits of the plaintiff's case in the impeachment proceedings is not a relevant matter for consideration in deciding whether or not the court should grant

a stay of the present proceedings. And Abdul Hamid Mohamad JCA (now FCJ), delivering the judgment of the Court of Appeal in the case of *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49, echoed the same sentiments when his Lordship succinctly said at p 69 to p 70:

> I do not think that a court hearing an application for a stay of execution should make a finding that the appeal is doomed to failure or even that there are no merits in the appeal. The reasons are given by Shanker J (as he then was in) in *Salim bin Ismail & Ors v Lebbey Sdn Bhd (No 1)* [1997] 2 MLJ 1 at p 3:
>
> The grounds of judgment of the trial judge are not before us and it would be premature for us to say that this appeal is without any prospect of success.
>
> I would venture to add additional reasons: in the case of the Court of Appeal or the Federal Court, the court that sits to hear the stay application, it is only constituted to hear the stay application, not the appeal. Indeed the appeal may not even be heard by the same panel. Not only the grounds of judgment, usually, are not before the court, but so are the appeal records. The court too does not have the benefits of the arguments on the merits of the appeal. In the circumstances, I am of the view that, as a general rule, it is not only premature but it is also unfair to the parties and wrong for the court, hearing an application for a stay, to make a finding that the 'appeal is doomed to failure', 'without any prospect of success', ' has no merits' and the like.
>
> Think of a trial judge trying to apply the principle when he is hearing an application for a stay of execution against his own judgment, which under the rules will have to be made before him first. Is he going to be his own judge and say that there are no merits in the appeal against his own judgment? Even if he honestly thinks so, experience shows (here I am speaking from my ten years' experience as a trial judge in the High Court, not to mention my days in the sessions and magistrate's courts) that there are cases in which the trial judge is very confident of the correctness of his judgment, yet it is reversed on appeal. On the other hand, there are cases in which he is not that confident, in fact has some doubts whether he has given a correct decision, yet, on appeal it is confirmed. That, perhaps, is one of the reasons why a person should not be his own judge.

That was certainly expressed in fine language. And I gratefully adopt them in this judgment.

[46] However, as can be seen from the case of *Serangoon Garden Estate Ltd v Ang Keng*, the merits of the case can be a consideration in deciding whether there are special circumstances. Nevertheless, whether or not merits are relevant in this case, I cannot state that there are merits in the impeachment proceedings. But the judgment of RK Nathan J in *Citibank Berhad v ND Chandrasegaran Nee & Ors* seems to suggest that there are merits in the impeachment proceedings bearing in mind that the application to strike out the impeachment proceedings has been dismissed.

[47] What is of importance is that all the relevant factors must be considered by me because it involves an exercise of my discretion (to paraphrase the words of Abdul Hamid Mohamad JCA (now FCJ) in Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd. And I have done just that.

THE SPECIAL CIRCUMSTANCES OF THIS CASE

[48] The following special circumstances must be highlighted and put to the forefront.

(a) Danger of perpetuating fraud on the court

[49] The basis of the impeachment proceedings is that the defendants in the impeachment proceedings had committed fraud on the court and the plaintiff in these present proceedings. As rehearsed earlier, RK Nathan J in *Citibank Berhad v ND Chandrasegaran Nee & Ors* has found that sufficient allegations of fraud had been raised in the impeachment proceedings and that the defendant clearly had a case to answer. This is a serious allegation made against the defendants in the impeachment proceedings in relation to their conduct in this case. If these present proceedings were to proceed, there is a real danger of the alleged fraud being perpetuated against this court and the plaintiff. This is a special circumstance that should weigh in favour of this court granting a stay of these present proceedings.

(a) The present proceedings could be nullified

[50] Another factor that needs to be addressed and considered is this. If the plaintiff succeeds in the impeachment proceedings, all the orders, judgments and decrees made in these present proceedings after July 1993 will be declared null and void and will ultimately be set aside. There will be no need, in such an event, for the proceedings to continue and by doing so now, the parties could, in reality, be wasting the court's precious time.

IMPEACHMENT PROCEEDINGS RENDERED NUGATORY IF NO STAY IS GRANTED

[51] The principle of nugatoriness has been confirmed in numerous cases. It has been approved by me in All Persons in Occupation of the House and the Wooden Stores Erected on a Portion of Land Held Under Grant No 26977 for Lot 4271 in the Township of *Johor Bahru, Johor v Punca Klasik Sdn Bhd* [1996] 4 MLJ 533. And it has also been alluded to by me in the case of *Institut Teknologi Federal Sdn Bhd v IIUM Education Sdn Bhd* [2005] 3 MLJ 221. Even the Federal Court in *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* has confirmed that the law of nugatoriness has not replaced the law of special circumstances. Recently, the Court of Appeal in *Rowstead Systems Sdn Bhd v Bumicrystal Technology (M) Sdn Bhd* [2005] 3 MLJ 132 vigorously applied the decision of the Federal Court in *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd.*

[52] Now, if these present proceedings are not stayed and in the event the plaintiff succeeds in the impeachment proceedings, the impeachment proceedings would be rendered nugatory. It is now ideal to refer to encl 88 which is the affidavit affirmed by Ng Sow Hua in support of the application for a stay and in particular to paragraphs 11 to 18 thereto. It must be borne in mind that the defendant in this case has not appeared in person and according to the affidavit in encl 88, she cannot be traced. The second defendant in the impeachment proceedings who acts for the defendant in these proceedings, has not been able to confirm the whereabouts of the defendant. In fact, encl 90 which purports to be the affidavit in opposition to the application for a stay was not even affirmed by the defendant personally. It is thus unclear whether the defendant is properly represented, if at all. This is further

compounded by the fact that the deponent of encl 90 is the fourth defendant (Siva Kumar a/l Subramaniam) in the impeachment proceedings and whose attorney of the defendant is being challenged.

[53] One possible consequence of the continuation of these present proceedings is this. That the plaintiff having to make payment to the defendant, whose location and representation, as is evident from the facts and the circumstances of the case, is in doubt. The deponent of encl 90 says that he is the lawful attorney of the defendant. The deponent is the fourth defendant (Siva Kumar a/l Subramaniam) in the impeachment proceedings and the issue of the defendant's lawful attorney goes to the root of the impeachment proceedings and that would be the fraud that is being alleged by the plaintiff. Thus, there is a real danger that the plaintiff will not be able to recover its money if it makes payment to the defendant and is later successful in the impeachment proceedings. This, by itself, constitutes a special circumstance in allowing a stay of these present proceedings. It is not immediately known how the plaintiff can make payment to the defendant as the whereabouts of the defendant cannot be confirmed. In such a situation, it would be prudent for the plaintiff to make payment to the defendant's solicitors or to the defendant's lawful attorneys. But, alas, both the defendant's solicitors and the person claiming to be the defendant's lawful attorney are the defendants in the impeachment proceedings and are the subject of allegations of fraud committed in these present proceedings. Lee Hun Hoe C.J. Borneo in *Re Kong Thai Sawmill (Miri) Sdn Bhd*; *Ling Beng Sung v Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2)* [1976] 1 MLJ 131, aptly said at p 132 of the report that:

> An appeal which would be nugatory if stay was refused by reason of the poverty of the respondent would be an example of special circumstances

[54] But the plaintiff here is not making any allegation pertaining to the defendant's poverty in advancing encl 87. It must be emphasised that *Re Kong Thai Sawmill* sets out an important principle of law that where the likelihood of recovery of payment is in doubt, a special circumstance exists.

[55] Here, there is a real difficulty in terms of locating the defendant and identifying her proper attorneys and these difficulties would surely bring about the same consequences. Just as the defendant's poverty makes it difficult to recover the necessary payments that should not have been made, so too would the uncertainty of the defendant's whereabouts be a factor to take into account in granting the stay.

[56] There are special circumstances in this case that justifies this court in exercising its discretion in granting a stay of these present proceedings. The danger of perpetuating a fraud on this court and the fact that the impeachment proceedings would be rendered nugatory, weigh towards the plaintiff and clearly show special circumstances that would justify this court in granting a stay of the proceedings. Such an order staying further conduct of the proceedings in this court at this stage would be a just and convenient order and it would prevent any undue prejudice occasioned to the plaintiff.

NEW ZEALAND SOCIETY OF PHYSIOTHERAPISTS V ACCIDENT COMPENSATION CORPORATION [1988] 1 NZLR 157

[57] This is a case emanating from the High Court of New Zealand presiding at Wellington. It is the decision of Eichelbaum J and according to the learned counsel for the defendant he will be relying on this case as a guiding principle to ground his opposition to encl 87. Eichelbaum J sets out a classic statement on the law of stay. It is sufficient to take a peek at the substance of the judgment from the headnotes at p 157 and I shall now reproduce them:

(1) Held, the ultimate objective on an application for a stay is to do what is just between the parties on the facts of the particular case.

(2) The established principles should be regarded as pointers in the search for what is just and include:

(a) Whether the applicant's right of appeal will be rendered nugatory if no stay is granted

(b) Conversely, whether the successful party will be injuriously affected by a stay

(c) The bona fides of the applicant as to the prosecution of the appeal.

(d) The novelty and importance of the issue involved.

(3) If the case involves an element of public interest this may also properly be taken into account.

(4) If the status quo has been held, in the judgment under appeal, to be contrary to law, there can be no particular merit in preserving it pending the appeal.

(5) In a situation where, whichever way the application is decided, if the party unsuccessful on the application for a stay is subsequently successful on appeal, irremediable injustice or irrecoverable loss will result, the following factors must influence the decision:

(a) Weight should be given to the judgment of the High Court. It presently is determinative of the parties' rights and, prima facie, the plaintiff is entitled to have it carried into effect.

(b) If a stay is refused, the incentive will lie with the applicant/appellant to have its appeal disposed of without delay. That position is preferable to the converse, where carriage of the appeal lies in the hands of the party in whose financial interests it lies not to hurry.

(c) If someone has to suffer an unjustified loss in the interim, it is better spread over the widest group.

[58] I will now proceed to examine the principles advanced by Eichelbaum J to the facts of the present case.

(A) WHETHER THE APPLICANT'S RIGHT OF APPEAL WILL BE RENDERED NUGATORY IF NO STAY IS GRANTED?

[59] The applicant here refers to the plaintiff. Now, the defendant states that the test of whether a stay of these proceedings should be granted is whether the plaintiff's right of appeal will be rendered nugatory if no stay is granted. The defendant rightly

points out that this is not an application for a stay pending an appeal but rather it is an application for a stay pending the disposal of the impeachment proceedings. The defendant submits that the test is whether the plaintiff's appeal to the judge in chambers against the assessment of damages made by the SAR will be rendered nugatory if a stay is not granted and since the appeal has not been heard then the question of nugatoriness does not arise.

[60] With due respect to the learned counsel for the defendant, these submissions are misplaced and untenable. The appeal to the judge in chambers is precisely the proceeding that the plaintiff is seeking to stay and that would be encl 39B, which is the only outstanding matter in these present proceedings. The learned counsel for the defendant submits that there is nothing to stop both the actions from proceeding simultaneously and that being the case the question of nugatoriness does not arise. Indeed, there is nothing to stop both the actions from proceeding simultaneously and it is because of this that the plaintiff has filed encl 87. The test is whether the impeachment proceedings would be rendered nugatory if these present proceedings are not stayed. The plaintiff has set out as to how the impeachment proceedings would be rendered nugatory if the present proceedings were not stayed and this has been set out somewhere in this judgment. Yet, the defendant has chosen not to reply to any of the plaintiff's submissions.

(B) WHETHER THE SUCCESSFUL PARTY WILL BE INJURIOUSLY AFFECTED BY A STAY?

[61] In the New Zealand Society Of Physiotherapists, this constitutes the second ground and it is an alternative ground to that of the first ground. Having shown in this judgment that the impeachment proceedings would be rendered nugatory if the present proceedings are not stayed, this ground of whether the successful party will be injuriously affected by the stay no longer applies.

[62] In any event, the defendant will not be injuriously affected as there is no damage that will be occasioned to the defendant that cannot be compensated for by costs. If the plaintiff were not successful in the impeachment proceedings, the appeal in these present proceedings would proceed accordingly. In the event that the plaintiff is unsuccessful in the appeal against the assessment of damages by the SAR in these present proceedings, the defendant will be compensated by costs. However, if the plaintiff were successful in the impeachment proceedings, there would be no need to proceed with the appeal in these present proceedings. If a stay were not granted, the damage done to the plaintiff cannot be compensated for by costs.

(C) THE BONA FIDES OF THE APPLICANT/PLAINTIFF AS TO THE PROSECUTION OF THE APPEAL

[63] It is acknowledged that there are many reasons for the delay in having this application heard and they are certainly a matter of record. For the defendant to suggest that it is all attributable to the plaintiff would be an embellishment of the facts. There are many avenues open to the defendant if the defendant were genuinely

aggrieved by any purported delay it is now claiming for. The defendant herself could have proceeded with the appeal or applied to strike out the case for want of prosecution.

[64] I must reiterate that the defendant should not be referring to those facts which are not before the court. Any arguments relating to the merits of the impeachment proceedings need not be taken here as it is not a consideration as to whether a stay should be granted. The defendant refers to proceedings before other courts and they are not relevant here. They only serve to convolute matters and they should be disregarded by this court.

[65] The defendant also submits that the plaintiff's application for stay will result in two proceedings before two different judges of the High Court at the same time. This argument is certainly misplaced and untenable. It is unclear what the defendant meant by stating that there will be a multiplicity of proceedings if these proceedings were stayed. This application is only to stay these present proceedings pending the disposal of the impeachment proceedings.

[66] The impeachment proceedings are designed to ascertain whether the two orders of this court, referring to the First Order and the Second Order, were obtained by fraud and ought to be impeached or set aside. It is not a re-hearing of the case that had been heard before this court. Rather it is to ascertain whether this court had been misled into making both the orders that it did in 1993 and 1994. Fraud is the cornerstone of the plaintiff's case.

[67] In any event whether or not there will be multiplicity of proceedings is an issue that ought to be decided by the High Court in the impeachment proceedings and not by this court. The defendant did not apply to strike out the impeachment proceedings on the ground that there will be a multiplicity of proceedings.

[68] In reality there is no multiplicity of proceedings. The basis of the impeachment proceedings is completely different from that of the stay application. The impeachment proceedings cannot be said to be an attempt at re-visiting the same issues as the present proceedings but rather it is to see whether or not the present proceedings should be stayed. It seems to me that the learned counsel is also making submissions based on the facts that are not before this court and is in fact giving evidence at the Bar. According to the learned counsel for the defendant, the reason as to why the plaintiff is seeking for a stay of these present proceedings is to enable the impeachment proceedings to be heard first and this is said to constitute and may be construed as mala fide. With due respect, this is exactly the reason as to why the plaintiff is seeking for a stay of the present proceedings. It is to enable the impeachment proceedings to be heard first otherwise the impeachment proceedings will be rendered nugatory. In my judgment, this is a valid and acceptable reason for allowing the application for a stay. It is not mala fide.

(D) THE NOVELTY AND IMPORTANCE OF THE ISSUE INVOLVED

[69] The issue involved is certainly very important. The basis of the impeachment proceedings is that the defendants in the impeachment proceedings had committed

fraud on the court and the plaintiff in these present proceedings. If these present proceedings were to proceed, there is a real danger of the alleged fraud being perpetuated against this court and the plaintiff. According to the plaintiff, this constitutes special circumstances that should weigh heavily in favour of this court in granting a stay of these present proceedings. I agree and subscribe fully to this submission.

(E) RES JUDICATA

[70] Adrian Clark J In The Matter Of The Trusts Of The Will of Tan Lye Deceased, *Yap Liang Neo v Tan Yew Ghee & Anor* [1936] MLJ Rep 113, in fine language, sets out the law pertaining to res judicata in these words (see p 121 of the report):

> What is then the position when a Court proceeds to adjudicate upon an issue between parties before it and does so in ignorance, shared by all the parties, that it has already previously adjudicated? All the advocates who have argued the present case admitted that it would at least have been in the discretion of the Court if, during the hearing, the true position had come to light, to have struck out the second proceedings as an abuse of the process of the Court. I think it would have been more than a matter of discretion. I think it would have been the duty of the Court to have struck out the proceedings.
>
> The object of the rule of res judicata,' said Lord Blackburn, in the case of *Lockyer v Ferryman*, (1876) 2 App. Cas. at p. 530, 'is always put upon two grounds, the one public policy, that it is the interest of the State that there should be an end of litigation, and the other, the hardship on the individual, that he should be vexed twice for the same cause.' It is on the second ground that the rule of pleading is based: if a defendant wishes to complain that he is being twice vexed in the same cause then he must plead this plea and not let it take his opponents by surprise. The first ground, however, is much wider and one which, in my view, goes rather to the jurisdiction of the Court.
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> When there is res judicata,' said Lord Selborne in the same case (at p 528 of the report), 'the original cause of action is gone and can only be restored by getting rid of the res judicata.' If an action be brought,' said Lord Kenyon in *Greathead v Bromley*, (1798) 7 T.R. 455, 101 E.R. 1073, 'and the merits of the question discussed between the parties, and a final judgment obtained by either, the parties are concluded, and cannot canvass the same question again in another action, although perhaps some objection or argument might have been urged upon the first trial, which would have led to a different judgment.' 'I apprehend,' said Willes J in the case of *Langmead v Maple*, 18 C.B.N.S. at p 271; 144 E.R. at p 447, 'that if the same matter or cause of action has already been finally adjudicated on between the parties by a Court of competent jurisdiction the plaintiff has lost his right to put it in suit either before that or any other Court.' 'It is not competent for the Court,' said Lord Macnaghten in the case of*Badar Bee v Habib Merican Noordin* [1909] App. Cas at p 623, 'in the case of the same question arising between the same parties, to review a previous decision not open to appeal.' 'Parties are not permitted,' said Lord Shaw in *Hoystead v Commissioner of Taxation*, [1926] App. Cas. at p 165, 'to begin fresh litigations because of new views they may entertain of the law of the case……

[71] The locus classicus would be the case of *Henderson v Henderson* (1843) 3 Hare 100, at p 115, where Wigram VC aptly states:

> … where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward

A their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, B but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

[72] The Privy Council in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* [1975] AC 581, reaffirmed the classic statement of Wigram VC in *Henderson* C *v Henderson* in these words (see p 590):

> But there was a wider sense in which the doctrine might be appealed to, so that it became an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings

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[73] All these principles of law are thought provoking and they have withstood the test of time. But, with respect, the defendant's arguments on res judicata are misplaced. The defendant is proceeding on the wrong assumption that the impeachment proceedings are attempts to re-litigate the matters, once again, before this court. In reality, the impeachment proceedings are to decide whether or not both E the orders made by Anuar J were obtained by fraud. The test is whether there was fraud committed on this court, and if so, how it had affected and influenced this court in making its decision.

[74] Fraud by a litigant is quite rare. It does happen. It rears its ugly head in the F case of *S.P. Chengalvaraya Naidu v Jagannath and others* [1994] AIR SC 853 at 855. There, Kuldip Singh J had this to say:

> The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire G and made observations which are wholly perverse. We do not agree with the High Court that 'there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence'. The principle of 'finality of litigation' cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not H process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person whose case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.
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> I The facts of the present case leave no manner of doubt that Jagannath obtained the preliminary decree by playing fraud on the court. A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. Jagannath was working as a clerk with Chunilal Sowcar. He purchased the property in the court auction on behalf of Chunilal Sowcar. He had, on his own volition, executed the

registered release deed (exh B-15) in favour of Chunilal Sowcar regarding the property in dispute. He knew that the appellants had paid the total decretal amount to his master Chunilal Sowcar. Without disclosing all these facts, he filed the suit for the partition of the property on the ground that he had purchased the property on his own behalf and not on behalf of Chunilal Sowcar. Non-production and even non-mentioning of the release deed at the trial tantamounts to playing fraud on the court. We do not agree with the observations of the High Court that the appellants-defendants could have easily produced the certified registered copy of exh B-15 and non-suited the plaintiff. A litigant who approaches the court is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party.

[75] James L.J., in *Flower v Lloyd* (1878) LR 10 Ch D 327 at p 333, made the following germane observations on fraud:

Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants sui juris and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories, or a misleading production of documents, or of a machine, or of a process had been given? There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on one side or other wilfully and corruptly perjured. In this case, if the Plaintiffs had sustained on this appeal the judgment in their favour, the present Defendants, in their turn, might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury; and so the parties might go on alternately ad infinitum. There is no distinction in principle between the old Common Law action and the old Chancery suit, and the Court ought to pause long before it establishes a precedent which would or might make in numberless cases judgments supposed to be final only the commencement of a new series of actions. Perjuries, falsehoods, frauds, when detected, must be punished and punished severely; but, in their desire to prevent parties litigant from obtaining any benefit from such foul means, the Court must not forget the evils which may arise from opening such new sources of litigation, amongst such evils not the least being that it would be certain to multiply indefinitely the mass of those very perjuries, falsehoods, and fraud.

[76] Fraud is also alleged in the impeachment proceedings and it will be dealt with by the S4 court. This judgment focusses itself on encl 87. I will now allude to other miscellaneous points raised by the defendant, not in its chronological order.

THE DEFENDANT'S CLAIM THAT THE PLAINTIFF IS MANUFACTURING FRAUD

[77] This is a serious allegation. The defendant submits that the plaintiff is manufacturing fraud to fit in its present claim in the impeachment action. It is the stand of the plaintiff that this allegation is an afterthought. It must be borne in mind that the defendant did not at any time apply to set aside or strike out the impeachment proceedings on the ground that there is no basis to the plaintiff's

impeachment proceedings. If the defendant's assertion that the plaintiff is indeed manufacturing fraud is correct, then the defendant would have been able to enter an appearance in the impeachment proceedings and apply to strike it out on the ground that it is baseless. This was not done by the defendant.

[78] The plaintiff's case in the impeachment proceedings are based on the fact that all the actions taken by the defendant in these impeachment proceedings after July 1993 were not taken by the defendant personally but by her purported powers of attorney and it was later discovered that the First and the Second PAs are not valid, unlawful and void ab initio and cannot be used in any court proceedings and/or dealings with the defendant's property. This, as I said, forms part of the particulars of fraud pleaded by the plaintiff in the impeachment proceedings.

[79] All these have to be decided by the S4 court that will be hearing the impeachment proceedings. The plaintiff will have to prove its case in the impeachment proceedings and if it fails to do so, then the orders made by this court after July 1993 will still stand. The learned counsel for the defendant is raising matters that are not relevant to the issue of whether these present proceedings should be stayed pending the determination of the impeachment proceedings or not. Issues and arguments such as the plaintiff's motive for starting the impeachment proceedings are not issues and arguments that are relevant as to whether these present proceedings should be stayed pending the disposal of the impeachment proceedings.

THE DEFENDANT'S CLAIM THAT THE PLAINTIFF HAS FAILED TO REVEAL THE FACT THAT THE SUMS OF RM256,408.49 AND RM48,092.40 WERE RECEIVED BY THE PLAINTIFF.

[80] These averments are untrue. It is designed to mislead this court. The plaintiff has revealed receipt of the sum of RM256,408.49 as alluded to in the early part of this judgment. And the sum of RM48,092.40 was paid by the third defendant (JR Gopinath @ JR Jaya Jaegauby) to the plaintiff by way of a Bank Buruh cashier's order no: 183538 dated 6 September 1993 as averred in para 17 of the impeachment proceedings' statement of claim at exh "NSH-1" of encl 87 at p 36 and such payment constituted the interests due based on the third defendant's own calculation. The plaintiff accepted the cashier's order on a without prejudice basis but it never presented the same for payment in order to safeguard its interest pending the outcome of the ongoing legal proceedings. The plaintiff even forwarded the cashier's order back to the firm of Messrs Khana & Co. The said cashier's order was subsequently claimed to be lost by Messrs Khana & Co and the amount of RM48,092.40 was paid back to Messrs Khana & Co by Bank Buruh Berhad.

[81] It is rather puzzling as to how the learned counsel for the defendant could submit that the plaintiff did not reveal about the monies and that there was suppression and omission of material facts by the plaintiff. The fact of the matter is this. That the plaintiff had revealed everything and did not hide anything.

[82] I must put on record that counsel on both sides have done their level best in presenting their arguments before me. I am grateful to them for assisting me in adjudicating encl 87.

CONCLUSION

[83] For the reasons as adumbrated above, I allow the plaintiff's application in encl 87 with costs in the cause. This means that all further proceedings before this court is stayed pending the disposal of the hearing of the impeachment proceedings in the S4 court.

Plaintiff's application allowed.

Reported by Navit Kaur Randhawa